THE RIGHTS OF IDEAS—AND OF CORPORATIONS

I.

THERE are some relics of German misty theorizing which western political science will do well to sweep away,—and of which it may nevertheless very easily forget to disembarrass itself. One is that huge Brocken-spectre, the State Grandmother — the thin and incoherent dream that Universal Insurance can take the place of Universal Responsibility. Responsibility can never be dispensed with: the true alternative is whether we shall be responsible to courts or to Overseers. Another is the idea that by calling monopolies "property," we invest them with some kind of universal world-wide sacredness. Another is the cloudy film of speculation which attributes to corporations a real existence comparable in the main with that of persons. It is proposed to examine some of the implications of such a doctrine.

It cannot be doubted that it is pretty firmly rooted in our minds. In these strenuous and hurried days, shorthand phrases are inevitable. We speak of the "X corporation," and visualize it in our minds as an entity, vague but single; redolent of board-rooms and russia leather, perhaps, rather than of forges and oil-cans; but nevertheless a single purposeful, sentient entity. We do not realize, and for the ordinary purposes of our accounts and forecasts we do not need to realize, that we are speaking in mere metaphor. There is no rather vast and elusive simple personage, scheming, feeling, wishing, hating, affectionate, behind that "X corporation" label: — just a set of miscellaneous people, with varying and contradictory desires, bent upon doing the best for their own individual interests, exercising very various degrees of power, and acting within the limits marked out by legislation.

The metaphor of personality is convenient: but it may be misleading.

Let us disclaim, however, the extreme dogma that there is nothing in a corporation beyond (1) the persons who are its members and managers, and (2) the legislative *fiat* which invests with peculiar consequences certain of their acts. Apart from legislative

interposition, there *is* something — a mystical something. There is something about a private club, particularly when it has a history. Grillon's: the Kit-Cat Club: the Recamier Salon: each has a character of its own. There is something about a school, a family, a regiment, a ship. There is something about an anthem: a symbol: a patent. There is a faint "something" about the commonest insurance corporation, such as are turned out by the dozen from the government factory of such objects. But do not let us fall into the error of calling that something "personality." There is much more personality about a cat or a dog.

Mr. Englehardt has written in a *spirituel* fashion of the Rights of Animals. And it is the present critic's conviction that such Rights exist, no less than the Rights of lunatics. But it is a long step from that to the Rights of Ideas.

The importance of the point is mainly, though by no means entirely, constitutional and international. When constitutional and international documents speak of "persons" and their rights, do they mean human beings, or do they mean to include ideas as well?

There is a tendency at the present day to take the metaphor at its face value — to argue hurriedly that "persons" of course includes "juridical persons," "artificial persons" as well as "natural persons." So much are we the slaves of words, we feel satisfied that things whose names look so much alike must somehow be approximately the same in nature, and entitled to the same consideration. So it is natural to forget that the juridical person is — though a real thing — a very different thing.[1]

There is a certain community of sentiment among all civilized peoples as to the feelings and desires of human beings, and their relations to those in authority. It is a very slender and scanty common understanding: but such as it is, it exists. Everybody knows what hurts: everybody knows what insults beyond endurance! Everybody knows what is universally regarded as intolerable and uncalled-for interference by the powers that be. There is a certain consensus on the irreducible minimum of human rights.[2] If this minimum is infringed, there is cruelty and op-

[1] *Cf.* 4 LAURENT, DROIT CIVIL INTERNATIONAL, 176, § 82.

[2] *Cf.* A. H. Snow, 8 AM. J. OF INT. L. (1914), 191. The learned author proceeds to suggest that the United States are inevitably driven to impose their own conception

pression, serving to afford foreign nations, or at any rate those directly affected, a title for interference.

But there is no such common consensus as to what Ideas are entitled to support, sustenance and furtherance.

For their support, sustenance and furtherance an individual state may set aside funds and may clothe persons with powers and liabilities. It may do this on its own account, or in pursuance of a general policy of encouraging private persons to devote their property to such ends. But there is no reason whatever why other nations should consider themselves bound to imitate its patronage of those particular ideas. And it is not a reason, but a camouflage, when the idea is called a person.

It is a somewhat paltry begging of the question to say that "A person is that which is by law invested with rights: corporations are by law invested with rights; therefore corporations are persons." It is only in shorthand phrase that the corporation is invested with rights. The only entities who can really be invested with rights are natural persons.[3] Only those who can feel and desire can have rights in any intelligible sense. Mill, in a celebrated passage, brings this out very clearly. "When people talk," he says, in effect, "of 'the good of agriculture,' 'the good of the Church,' 'the good of education,' 'the good of art,' they really mean simply the good of particular human beings."

This feeling lay at the root of the English history of corporations. The first kind of English corporation was apparently the departed saint: and this was a very real person to the lawyers and people who considered his or her Rights.

It was in the name and on behalf of the personal and individual Saint that the corporeal Abbot or Prior with his chapter began to function as a corporation: and in general the Abbot could say as a matter of practical politics — "le monastaire, c'est moi."

II. Eleemosynary Corporations and Trusts

The attribution of personality to business corporations was a matter of slow evolution. Parallel with it there proceeded the

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of fundamental individual rights upon other peoples. That seems to go too far. A community of angels might do better than endeavor to force the world to behave angelically.

[3] 4 Laurent, Droit Civil International, 209, § 101. Laurent remarks that the

virtual attribution of personality to charitable trusts: in fact, it may be said that the last-mentioned development was much the more rapid of the two. For by the time of Queen Elizabeth, the enforcement of trusts in favor of charities had become so regular and frequent as to require statutory regulation[4] — whilst as yet the trading corporation had made its appearance only in the form of a few chartered companies. The position of the trustees of charities is no doubt very different from that of the directors and managers of corporations: and for that reason many charities are and always have been incorporated. But the common feature remains, that in each case machinery is provided for withdrawing property from individual use, and putting it at the disposal of an Idea. Formulated by the dead, or by the living, a charitable trust or an eleemosynary corporation is the embodiment of an Idea. It is mere machinery by means of which the state secures the more or less perfect performance of a particular intention. If that intention is disappointed, — and the state often disappoints it itself, by remodelling the purposes of the corporation — no living individual is in pocket one cent the worse off: all that is, or may be, injured is the sentiment, favorable to the Idea, of miscellaneous persons.

There may be apparent exceptions to this statement. Those who have been in the past the individual objects of charity, and those who have in the past been its salaried dispensers, may have a certain interest in the funds of the trust or corporation. But it is not a legal interest. The child of a person who is despoiled of the bulk of his property loses its allowance, its expectations, and perhaps its educational prospects. But these disappointments are not legal injuries. The only person entitled to complain is the parent himself. If an almshouse is abolished, the almsman and the nurse may complain respectively of the loss of their comfort and their job. But they have no right to the comfort and the job. They are the objects of miscellaneous or deceased benevolence. If any other nation declines to believe in the beneficence of almshouses, — if it denies the almshouse Idea — it is at perfect liberty to decline to facilitate the scheme mapped out by its neighbor.

Code Napoléon never uses the term "personne civile" and nowhere accords the enjoyment of civil rights to "fictions." *Ibid.* 152, § 72.

[4] The well-known statute, 43 Eliz. c. 4.

Just in the same way, it may deny the Monarchical Idea, the Hospital Idea, the Medical Research Idea, the Medical Research Restriction Idea — even the Anti-Slavery Idea: for as long as coolie "indentured" labor subsists, no nation can be blamed for frankly calling the dwellers in its compounds "slaves."

That the particular Idea in question has many adherents who warmly believe in it, in the country of incorporation, can make no difference. Many English people are interested in the Coliseum and Mr. Bryan. But that does not make either Mr. Bryan or the Coliseum an entity which the British government is entitled to have preserved intact. Not even if British subjects should have subscribed to a fund to repair the ruin, or to testify their admiration for the statesman, will such a result follow.

If, therefore, property is formed, or acts are done, in a certain territory the benefit of which is claimed for a "juridical person" incorporated abroad, all that is meant is that somebody, for some reason of his own, demands that the local sovereign shall see that the property is applied, or the acts regarded in a particular way marked out by some foreign sovereign. But there is no common concensus of international opinion that the wishes of a deceased person, or of a heterogeneous body of subscribers, should necessarily be carried out. There is certainly no rule that a given country is bound to recognize the power of testation. More and more it is coming to be recognized that some limit to this power is the only just method of redressing inequalities of fortune: — and if some limit, why not an extreme limit? Nor is it any the more bound to recognize the putting of personal property into mortmain.

This can be seen quite plainly, when it is an unincorporated trust that is in question. No matter if the trust formed was contributed by foreigners and vested in foreign trustees: if the objects are not recognized by the law of the land, the law of the place where the property is situated is not bound to give effect to them. By its own theories of private international law it may be led to do so: but it may equally well adopt a theory which does not have that result.

It is not like the case of an agent, who is intrusted by the subscribers with their money, in order to apply it as they wish. They can recall their agent and resume their property. But the definite

devotion of property to an Idea divests its former owners of any proprietary interest in it. It is at the service of the Idea. All who are interested in the Idea may in varying degrees be interested in its fate — but it is not their property, and no diversion of the fund to other uses will amount to that confiscation of property which is reprobated by the universal conscience. That a charitable trust exists by favor of the sovereign, and is capable of being diverted at his will is a commonplace. Then is one sovereign, into whose power the funds may come, under any obligation to defer to the wishes of the one in whose power they originally were? It may be very proper and decent to do so: but is it necessary? If an emissary of a trust formed to establish an art gallery in Baratania goes to Utopia to purchase pictures, is Utopia bound to let him do so, because the art-gallery is called a "person," and "persons" must be admitted to buy and sell? No "person" really buys: the pictures are devoted to certain uses in Baratania instead of remaining private property in Utopia. And to prevent that is not to hinder any "person" from "buying."

Take even the case of a trust of funds locally situated in Italy, established by a living Italian to provide a public garden in Ithaca, New York, and carried into effect by a deed executed in New York transferring the funds to trustees. There is no reason why the Italian courts should enforce the trust, nor why the Italian donor, repenting of his gift, might not be maintained in or restored to his control over it by the Italian courts, without any international incident being created. The disappointment of Ithaca people is not their despoilment. The fund is not their property, though they may derive some benefit from it. To argue to the contrary is to maintain the universal obligation and validity of trusts: *i. e.*, to claim that foreign nations shall observe a strange law; which is not a claim any one could wish to make.

But the "personality" of a corporation comes in to obscure the issue. We can see that there is no "nationality" in a trust. In the last resort, the country to pronounce on the destination of property is that which has the property actually within its borders, or which has within its borders persons upon whom effective pressure can be put to bring it there. In discussing the validity of a trust disposition, charitable or other, the nationality or domicile of the donor is of not the slightest importance. Nor is the

nationality of the *cestuis que trustent* nor the place of charitable benefaction. The only important questions are — where are the trustees, and where is the money? Similarly with regard to the acts of trustees: it is open to any country to decline to recognize the trust relation, or any modifications of right arising out of it, in other countries.

Though there is an international obligation to respect property, there is no international obligation to respect the subtle complications and divided responsibilities of trusts. Any country may consider all trusts as precatory trusts.

No one country establishes a trust, and leaves other countries to deal with it on that footing. The parties declare their intention, and the various countries, on an equal footing, say severally what they will make of it. They are practically unfettered in doing so: provided that they do not wantonly deprive an alien individual of his property. And it is by no means clear that forfeiture for an attempt to alien into mortmain would be wanton. Indeed, the contrary would seem the better opinion.

But one country does establish the corporation; and the fact lends color to the popular supposition that the incorporated charity has a distinct national character, entitling "it" to the privileges and protection of a citizen. But let us analyze exactly what takes place. We have, no more and no less than before, the devotion of property to an idea, in accordance with the desires of a fluctuating body of people, and perhaps in accordance with the desires of the government itself. But the fact that the government, or the law, purports to establish a new entity, an "artificial person," should not be allowed to obscure the fact that, in reality, it does no more than it accomplishes when it recognizes a charitable trust. No more in kind, that is: in degree it generally goes considerably farther. All that it does, in essence, is to clothe the persons who are carrying out the idea with certain powers, liabilities, and immunities which they would not otherwise possess or be subject to. And there is no reason in the world why other countries should imitate it in this respect. It has not created a person: it has merely set an example.

It might just as well enact that horses and donkeys were to be regarded as "subhuman persons," if duly admitted to registration and managed by committees, — and then demand that they

should be received everywhere on the footing of citizens, and admitted to sue and to acquire property. They might also, perhaps, be admitted to vote, by their committees, at home!

It is speciously urged by some writers that the corporation is created to subserve the purposes of the state: that natural persons have rights to a claim to protection only inasmuch as they subserve the purposes of the state: and therefore that both are alike modes of the state's activity and equally to be respected by foreign powers. Such a view might have had weight with some before the *débacle* of the state in 1918. It may still be held *sub rosâ* by the Treitsches and Bernhardis. But if democracy means anything beyond mere Bolshevism, it means the supreme value of the common private man. The events of the past four years are a flat denial of the doctrine that people exist for the sake of states and not states for the sake of people. When a state is permitted to interpose on behalf of an oppressed citizen, it is not because the victim is useful to it, but because he is a man.

In his suffering all the world has a share. Because of his humanity, all nations applaud the interference to save him from arbitrary brutality: not because he is a potential tax-payer or brigadier-general of Atlantis or Ruritania. A world of states might be imagined, in which the occupation of every soul was with the grandeur and glory of the various states to the exclusion of all thought of the individual. But it is not our world.

III. Public Corporation

But there are certain foundations in which the state is not only intrusted, but in which it finds a mode of carrying out its own activities. Of this kind are towns and cities. In their functioning, it is difficult to see anything less than a form of the public activity of the state. For, consider that it is open to any one to reside in the town: to walk in its streets: to use its fountains: to invoke its police. A fluctuating and heterogeneous population enjoy, in various measures, the benefits of its existence. No individual specially is identified with them. They are open to any of the public who are in a position to profit by them. The same may be said of great professional corporations established for public purposes. In these cases, although the corporate body may, by municipal law, be considered, for the sake of convenience,

separate from the state, yet by natural law, and internationally, it must probably be considered as inseparably bound up with it. In some countries, government dependents or officials have a corporate character — and this is true of some British administrative offices, such as the Board of Trade, the Local Government Board and the Charity Commissioners, which, if I am not mistaken, all have a common seal with perpetual succession, and perhaps may possess property independently of the Crown. Clearly these are, internationally, nothing other than the state itself. Local corporations such as towns and cities are no less limbs of government because they specialize in locality rather than in subject matter. It is for the benefit of all comers of French nationality that the municipality of Nice is kept up — not for the benefit of the individuals who at the moment occupy or own its houses. History obscures the point. We are so familiar with the contests between the Crown and the municipal corporations which formed an outstanding feature of the history of the later English Stuarts, that we forget that the close municipal corporation of the seventeenth century was a totally different thing from the municipality of our day. It would not be untrue to say that the private profit of the corporators was a considerable factor in the outlook of many, if not most, of the municipal corporations of that past age.

But at the present day, it is difficult to refuse concurrence to the opinion that the rights and liabilities of such public corporations are in essence the rights and liabilities of the state.

"Counties, cities, and towns exist only," says the Supreme Court, "for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will."[5]

If we are disturbed by the recollection that cities and towns can and do sue each other, we may quickly be reassured by the remembrance that colonies do the same. It is strange to those Britons reared in the doctrine that the Crown is present and identical in all parts of its dominion, to find the colony of South

[5] Ry. Co. *v.* Otoe County, 16 Wall. (U. S.) 667, 676 (1872); approved, Stewart *v.* Kansas City, 239 U. S. 14 (1915); 4 LAURENT, DROIT CIVIL INTERNATIONAL, 248, § 125; 252, § 127.

Australia suing the sister colony of Victoria. In point of law, it amounts to the King in South Australia suing himself a few hundred miles away: and although legislation has made such an anomaly possible in Canada, nothing but a certain sheeplike docility to suggestion has provided for it in Australia.[6] Such a process resembles the cook suing the butler for a declaration that the household allowance should be spent less on the wine-cellar and more on the kitchen. And the detached attitude towards each other displayed in recent days by government dependents in England itself suggests that in the not remote future we may be exhilarated by the spectacle of the Home Office suing the Agricultural Department, and the War Office suing the Local Government Board.

Now, is an Idea any the more entitled to respect abroad, because it is the state's Idea?[7] It is impossible to give an easy credit to this position. The state's existence is one thing — its fancies are another. Its channels of life and administration — its towns, its ruling powers, its armed forces — are entitled to respect. But — knowing how gullible it is in matters of more subtle texture — we may find it difficult to say that it is entitled in the opinion of man-

[6] South Australia *v.* Victoria, [1914] A. C. 283. The government of New Zealand was, under a more coherent conception of constitutional law, held in 1876 incapable of being a party to an action. Nothing had incorporated it: it was a mere mode of the exercise of the powers of the Crown. The constitutional understanding that these powers would be exercised agreeably to the wishes of the local legislature in no respect alters the legal position. Sloman *v.* New Zealand, L. R. 1. C. P. D. 563 (1876). "What is the thing called the governor and government of the colony of New Zealand? . . . We cannot have substituted service on somebody representing something which does not exist. There is an individual who for the time being is the governor of New Zealand; there are certain persons carrying on the government; there are probably a secretary, and a treasurer, and an attorney-general and others, and there are the members of the representative assembly and council who constitute the legislature; but to call them a corporation seems an abuse of language. We must take notice that there is no such corporation as a governor and government of New Zealand." Per James, L. J., same case. The Australian Constitution Act (STAT. 63 & 64 Vict., c. 12) has not introduced a different system in the case of Australia: the power to resign territory is vested in the provincial parliaments; and it would seem strange if their governments could deal with it over their heads, by collusive litigation. In Canada the position is really different: legislation has enabled the provinces to litigate, and to that extent has invested them with a corporate character. (See, *e. g.*, REV. STAT. OF CANADA, c. 140, § 32 (1906).) The Australian federal parliament has power (*ibid.* § 9 (78)) to provide for similar litigation, but apparently had not done so when South Australia *v.* Victoria was decided.

[7] That is, in reality, the idea of some one who is or was in authority.

kind to any special respect for its ideas. When we remember that Nahum Tate was, and that Algernon Swinburne was not, poet laureate of England — that the government designed the Crystal Palace of 1851 and the Albert Memorial in Hyde Park, London — that the bureaucratized universities of Germany lighted the match that set the world in a flame these five years back — we may stop short of concluding that by the universal consensus of mankind everything governmental is (except in the worst sense of the term) respectable.

It may be supposed, therefore, that public corporations not directly concerned with the work of conducting the national life must be relegated to share the lot of other corporations constituted for similar ends by less imposing agencies.[8]

IV. Trading Corporations

When we come to the Trading Corporation we find an entity which in many ways closely resembles the unincorporated trust. If we can imagine a partnership created by trust deed of the capital we approach very near the conception of a trading corporation. The perpetual succession which the corporation postulates is supplied in the latter case by the principle that "a trust shall never fail for want of a trustee." Except for small and technical advantages, such as the facility of dealing with shares instead of miscellaneous property, and the simplicity of litigating with one imaginary person[9] instead of a thousand real ones, the only remarkable feature of a trading corporation is the limited liability of its members. It is a mere device by which a state confers on traders particular powers and immunities on particular terms. In *Continental Tyre & Rubber Company, Ltd.* v. *Daimler Co., Ltd.*,[10] the most scientific lawyers of Great Britain were led to recognize that the essence of a joint stock company is not its empty shell — the form bestowed on it by some particular state, carrying certain immunities and regulations — but the substantial reality operating it: the persons who are its shareholders and directors, and who control and profit by its business. Just as Joseph Story had hinted

[8] 4 Laurent, Droit Civil International, 253, § 128.

[9] This convenience can equally well be secured by a rule of court. *Cf.* Rules of English Supreme Court, Order 16, rule 9.

[10] L. R., [1916] 2 A. C. 307.

a century before, at the possibility that behind a "Society for the Propagation of the Gospel in Foreign Parts," the court might be forced to see the individuals who constituted that society, so the House of Lords in the *Continental Tyre Case* felt bound to look behind the English veil of registration, and to see whether enemies were not lurking there. In other words, they treated the "juridical person" as what it really is — a shorthand expression for peculiar rights and liabilities. They declined to be misled by phrases, and to ignore, in a pedantic literalizing of metaphor, the living human beings for whom, and for whom alone, the company had its being. Registration as a limited company only exempted them from full liability to pay their debts, and in minor ways made their commitments by their agents somewhat different from that of a partnership firm.

Now there is no reason why any other country should feel bound to recognize these special varieties from the ordinary law in its own territory, merely because the corporators have secured them, by registration as a company, in some other state. And this is essentially what the claim for the recognition of juridical persons abroad amounts to. It amounts to a claim of privilege. Convenient privilege, it may be; but privilege none the less. No foreign state is bound to accede to it: unless all privilege is property.

There are many difficulties, which can only be hinted at here, when private profit and the public service are combined. The chartered companies, the establishment of which has been the traditional policy of England (perhaps, if we remember the Darien Company, we may say of Scotland also) in undeveloped countries: public utility corporations: "garden city" or "public-house" corporations: — such organizations as these are of a complex and perplexing character. In part they embody actual state functions: in part they embody a mere idea affected by the state: in part they exist for mere private gain. Their emancipation from direct government control must always, I think, prevent their assimilation to direct public activities. That leaves it comparatively unimportant to determine their precise classification. The element of private gain seems decisive, if a decision be called for. And it is also important to notice that the government as a rule disclaims all pecuniary responsibility for the acts of those agencies which it has set on foot.

V. Nationality and Domicile. War Conditions

It may confidently be denied, therefore, that a corporation, in general, can have either a nationality or a domicile.[11] The supposed necessity that it should have either arises simply from a confused supposition that the corporation must imitate at all points a natural person.

Nationality is a matter of allegiance. And a corporation has — *pace* the *ex parte* deliverance of Mr. Alfred Lyttleton in the case of the Netherlands South Africa Railway — no power of rendering aid and comfort to anybody. Its directors can: but that is another story. Domicile is in origin and principle a matter of having a home and spending an income.[12] And a corporation cannot enjoy Queen Anne furniture nor drink claret. Not even a metaphor worshiper could quite realize that brilliant conception — though he might in words formulate it as an axiom.

In fact, the corporation need have neither domicile nor nationality. Those who have endeavored to fix it with one or the other have wandered in the wilderness of bleak uncertainty. Sometimes the thunderous voice of the law of the place of incorporation has sounded in their ears: sometimes the lightning flash of the place of exploitation has revealed to them another rule: again, the gleam has shown them the calm Olympia of the spot where the Board meets and control is exercised. Some have looked for domicile — others for nationality — others have not been particular which — others have said that for corporations domicile is nationality. But really they have given themselves unnecessary trouble. The dominant reason for desiring to fix corporations with one or the other attribute is fiscal. The state sees what is called a person and

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[11] Since writing this article, I find that much of what I had to say is expressed a great deal better in 4 Laurent, Droit Civil International, § 72 *et seq.*, § 119 *et seq.* As I have never seen these views put forward in English, the present article must be regarded, for what it may be worth, as a corroboration rather than a reflection of the Belgian jurist's opinions.

[12] This grounds the true distinction between "domicile" and "house of trade" as criteria of the liability of goods to capture as enemy property. The proprietor of a "house of trade" *makes* money. The domiciled citizen *spends* it. If war-domicile meant carrying on business, there would be no need for the conception of "house of trade." In fact, the two are complementary. *Cf.* "Trade Domicile in War" in 21 Juridical Rev. (Edinburgh), 209.

forthwith desires to tax it. Tax depends in many countries on domicile: consequently a domicile must be found for each corporation. The state seizes goods as prize: nationality is in many countries the test of prize — consequently, every corporation must have a national allegiance.

There is no such necessity. In prize, it may not unjustly be held that the infection of a hostile share condemns the whole. That has not been the Anglo-American way — but it is a possible way. The Anglo-American way is to distinguish the interest of the enemy and to confiscate it alone. The joint property of friends and enemies was so dealt with in The *Eenrom*[13] and *The Vreede Scholtys*.[14] It ought not to be difficult to discriminate between the interest of friends and enemies in goods which are the property of corporations. As to taxation, the necessity of attributing to corporations a domicile or a nationality is more apparent than real. The shareholders are never taxed twice over on the same grounds in the same country, in their corporate and in their individual capacity. It only requires an enactment that carrying on business in the realm is a ground of taxation, to make the corporators liable. There is no need to attribute a fictitious domicile to the corporation because the corporators are not domiciled in the taxing area. It only needs that their liability be placed on its true ground.

The interesting question which arises as to the effect of war on a corporation, nobody seems inclined to tackle *au fond*. The attempt was long made to evade the necessity by the facile method of attributing to the corporation an independent nationality of its own — usually that of the place of incorporation.[15] Candidly, the present writer, when considering the problem twenty years ago,[16] was very strongly impressed by its difficulty. But much stronger was the impression of its urgency. If the doctrine of non-intercourse with alien enemies — to mention only one feature — was not to be emptied of content, it was clearly impossible to allow friends and enemies to work together in the bonds of peace under

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[13] 2 C. Robinson, 1 (1799). See also The Kinders Kinder, *ibid.* 88 (1799).

[14] 5 C. Robinson, 5 n. (1804). (The property was actually documented as the property of the enemy; and probably this is the reason why the court said that a stricter rule might be applied if the shipment were made *after* the outbreak of war.)

[15] See, *e. g.*, in England the *dicta* in Driefontein *v.* Janson, L. R., [1902] A. C. 484.

[16] INTERNATIONAL LAW IN SOUTH AFRICA, chap. 6.

the veil of a home-registered company. It appeared to me, and still so appears, that it is neither fair to the enemy to exclude him from control, while playing with his money, nor, on the other hand, possible to admit him to that intimacy of communication which control necessitates. The conclusion seemed to be imposed that the dissolution of the corporation was imperative: just as in the case of a partnership. The only criticism which I have seen of this attitude is that it ignores the difference which exists in practice between a partnership and a corporation. In practice, it is urged, shareholders do not interfere in the management. I confess this surprises me. Are there not such things as sleeping partners? Do not shareholders occasionally prove restive at annual general meetings? The only substantial difference, as it seems to me, is that a partnership is *ipso facto* dissolved by war, whilst a corporation cannot be liquidated except by some judicial process. If the friendly corporators move in the matter, there seems to me a plain case for reconstruction — unless we frankly avow the principle of confiscation of the enemy's private property. If, however, they do not move, it is a more difficult case. It is impossible to allow the enemy shareholders a *locus standi:* the proper course would appear to be for the sovereign authority to sequestrate their interests (which, in a sense, are its own)[17] and to apply for liquidation. The capital may not all be paid up, or there may otherwise be liabilities attaching to the shares, and it is contrary to justice that the enemy subjects should be committed to incurring these in their absence. Little authority, indeed, seems to exist as regards the proprietary results of the forced dissolution of partnership itself which supervenes on war. As a contract, the partnership disappears; and as a mandate it ceases to exercise any effect. But as a title to property there seems some difficulty in estimating the effects of its dissolution. Do the continuing partners in fact absorb the assets, subject to a liability to account? Under a régime of sequestration and as is inevitable in a prolonged war, there is little difficulty: and perhaps sequestration will be the rule in the future. But in the absence of any such governmental step it is hard to see what becomes of the partnership

[17] They constitute a material guarantee for the performance of the eventual terms of peace.

assets, unless (as seems to have been the old theory of the law) they fall automatically to the state. Much more difficult — in the absence of all judicial guidance — is it to say just what ought to become of enemy shares and corporation assets. To leave them to follow the fate of the corporation is plainly to allow the friendly interests (which may be nearly *nil*) and the friendly managers (who may be agents merely) to speculate with their co-shareholders' or employers' money. That superficially attractive course is really quite inconsistent with any ostensible principle of equality between friend and enemy. It would seem the ideal course to force the corporation into liquidation by denying all validity after the outbreak of war, to the acts of corporations having enemy shareholders (or, perhaps better, to allow any member of the public to apply for liquidation). It will be said that this is a highly inconvenient course, and doubtless so it is: the remedy is for the government to interpose and forthwith take under its control the enemy holdings. The highly inconvenient alternative will secure its performance of this moral duty, which it might otherwise neglect. The value of the enemy holding will thus be stabilized at the outset of hostilities, and rendered independent of the subsequent fluctuations of trade. At the same time, the enemy holders will be released from all responsibilities incurred in the future. The only alternative is what appears to the writer the unjust one of holding the enemy persons bound by proceedings over which they have no control, and in which their interests will not be considered, — or, if anything, will be regarded with a hostile eye. I regret this conclusion: it is cumbrous, but it seems imperative.

The only logical alternative is to abolish the principle which declares the illegality of intercourse with the enemy. And this is a principle which has just been applied to an extent far exceeding its scope in any previous war. Nations have prohibited even the receipt of payment from the enemy,[18] and have placed inter-

[18] Contrary to the *dictum* in Allen *v.* Russell, 3 AM. L. REG. 361, "If an enemy within the rebel lines should order his agent in this state to pay a debt, contracted lawfully before the war, with property or money, I am not aware of anything wrong in this according to the public law of war. Goods might be seized when passing, but the appropriation of property or money already here, is not prohibited to the payment of debts to our people, is not only honest, but takes so much of the funds of rebels to another use. . . ."

course with enemies under heavy criminal penalties: — both quite novel features.

Doubtless this has been due to the impression (dating from about 1850) that it injures the enemy to strike at our own trade with him, rather than to the old idea, as expressed by Story and Stowell, that all communication implies the possibility of danger. But there seems little likelihood of that impression being weakened or dispelled. The position of the enemy shareholder, therefore, urgently calls for due consideration.

What, moreover, is the proper attitude of neutral states to such corporations when admitted to function within their borders? Is the rule against intercourse between belligerents a rule of international law to which the neutral is bound to give effect by dissolving, or (what is the same thing)[19] regarding as dissolved, companies containing mutually hostile elements? Is a partnership of a domiciled Italian and a domiciled German *ipso facto* dissolved in Barcelona where they reside and carry on the whole of its business? Or where their Spanish agent does so? When we have solved this question, we shall be in a position to approach the further problem of the light in which a corporation in which Americans and Germans are shareholders, and which is incorporated (a) in America or Germany, (b) in Spain, (c) in Sweden, ought to be regarded at Madrid. *A priori*, one would say that recognition of the corporation at all by the Spanish law is really equivalent to a special kind of incorporation in Spain — and that it rests entirely with the Spanish government and legislature to say whether the presence in its membership of persons belonging to mutually hostile nations is or is not a cause of dissolution.

VI.

These considerations are put before the learned reader with the greatest diffidence: and rather as matter for inquiry than as the final expression of conclusions. What is, however, insisted on is the vital importance of discarding fictions, — of piercing through the semblance of things to realities, — and of refusing to be deterred by difficulties and considerations of temporary practical convenience from arriving at the true dictates of justice. Above

[19] 4 LAURENT, DROIT CIVIL INTERNATIONAL, 231, § 119.

all, it is imperative that the jurist should not submit to be dragged weakly submissive at the chain of metaphor.

Of course, for particular municipal purposes, it may be a convenient fiction to attribute nationality to a corporate body. It may even be possible to force one's own particular code-words on the public at large. But so long as the general body of mankind finds a marked difference between a human being and a set of regulations, so long will it be improper to assume that the same name includes them both. Convenience is mighty — but when it begins to obscure the outlines of justice, it must perforce come down from its pedestal.

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